GATEWAY LAND PTE. LTD.

v.

TURNER (EAST ASIA) PTE. LTD.

HIGH COURT, SINGAPORE
TS SINNATHURAY J
[ORIGINATING SUMMONS NO. 1046 OF 1986]
30 DECEMBER 1987

CONTRACT: *Arbitration section 388(1) of the Companies Act - Security for costs.*

The applicants sought an order against the respondents for (a) security of costs of an arbitration: (b) stay of proceedings before the arbitrator until security was furnished; and (c) costs of the application. The application was made under s. 388(1) of the Companies Act. There was a complex arbitration proceeding between the applicants, the owners of a building project, and the respondents, main contractors for the project. The applicants put the cost of the arbitration proceedings in the region of $500,000.

The respondents resisted the claim for security and while admitting financial difficulty, stated that if security was ordered they would be unable to proceed any further in the arbitration proceedings. However, they contended that their claim in the arbitration proceeding against the applicants was a *bona fide* claim in the region of $115 million. They further contended that their claim was of great concern to the sub-contractors who supported their claim and if arbitration proceedings were to come to a halt, these other persons to whom no blame was imputable would suffer. They therefore argued that the application for security was oppressure to the respondents.

Held:
Citing English authority that the Court had a discretion in ordering security even after it was shown that there was reason to believe that the respondents would be unable to pay the costs of the applicants. In a case before the Court of Appeal of England :

(a) the application for security being made shortly before the date fixed for the hearing:

(b) the probable inability of the respondents to pay the costs being dependent on failure to recover sums being claimed in that very arbitration; and

(c) the possibility that an order for security might result in the respondents being unable to proceed at all with their *bona fide* claims; were held circumstances which a Court would take into account in the exercise of its discretion. Since the provision in our law was identical to the provision in the English Companies Act, our Courts would exercise the same discretion. In the present case the facts were more favourable to the respondents than those in the English case. There was also the added fact here of the innocent sub-contractors whose claims were wholly dependent on the arbitration proceedings. An order for security for costs would be oppressive to the respondents.

[Application dismissed with costs.]

Case referred to:
Parkinson & Co. v. Triplan Ltd. [1973] 1 QB 609

Legislation referred to:
Companies Act [Sing], s. 388(1)
Companies Act 1948 [UK], s. 447

JUDGMENT

TS Sinnathuray J:

In this originating summons, the applicants, Gateway Land Pte. Ltd., seek against the respondents, Turner (East Asia) Pte. Ltd., the following orders :

(a) That the respondents Turner (East Asia) Pte. Ltd. within 14 days from the date of the order to be made hereon provide security for the applicants' costs of a pending arbitration between the applicants and the respondents in the sum of $500,000 or such other sum as this Honourable Court deems fit.

(b) That in the meantime all further proceedings in the said arbitration, other than the proceedings, relating to the giving of such security for costs, be stayed.

(c) That the costs of this application be paid by the respondents to the applicants.

The application is made under s. 388(1) of the Companies Act (Cap 50) which provides as follows :

> Where a corporation is plaintiff in any action or other legal proceeding the Court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.

There is a dispute between the applicants, the owner of a building project, known as "the Gateway Project" and the respondents, the main contractors for the project. The main contract is a lump sum contract for $221 million. Under the terms of the contract, the parties have referred the dispute to arbitration and a three-member arbitration panel has been agreed upon by them. The points of claim, points of defence/counterclaim and points of reply have already been filed. At the time of the hearing of this application, the proceedings were at the stage where the parties were obtaining directions.

The issues for determination in the arbitration proceedings are complex. On the facts, there are complicated, technical, engineering, soil and construction issues. On the legal side, questions arise concerning construction of documents, repudiation and fundamental breach. Having regard to the cessation of the project and the specified sum in the contract, the issue of damages will be of a very considerable sum.

It is anticipated by the parties that there will be a lengthy arbitration. The arbitration hearing itself will take between 3 to 6 months, involving as it would expert witnesses, both local and from abroad. The applicants put a conservative estimate of the cost of the arbitration proceedings in the region of $500,000.

The respondents strongly resist the order for security for costs. They frankly admit that they are in financial difficulties and, if security is ordered, they will certainly not be able to proceed further in the arbitration proceedings. But they forcefully contend that they have a *bona fide* claim and a good case against the respondents.

Counsel for the respondents, puts the respondents' claim broadly under 3 heads :

(a) for work done up to the date of termination of the contract;

(b) for damages for breach of contract including a claim for future profits;

(c) for loss and expenses arising from the termination.

The total claim of the respondents is estimated in the region of $115 million.

Another consideration put forward for the respondents is that, as the respondents are the main contractors, their claims in the arbitration proceedings are of great concern to the sub-contractors. Two big sub-contractors, Gammon and Brightside/Woh Hup, are in support of the respondents' claims against the applicants. If arbitration proceedings were to come to a grinding halt, these other innocent people will suffer.

Taking all these circumstances together, Counsel for the respondents submits that the application for security for costs was oppressive to the respondents. He relies on *Parkinsons & Co. v. Triplan Ltd.* [1973] 1 QB 609.

In that case Triplan, a small company which had carried out sub-contract work for Parkinsons, the main contractor, a large public company, issued a writ for outstanding balances due to them. The proceedings were stayed and the dispute went to arbitration. Shortly before the hearing of the arbitration, Parkinsons, having found out that Triplan was in financial difficulties, applied to the High Court for security for costs of the arbitration under s. 447 of the Companies Act 1948. It was submitted for Parkinsons that once it was shown that there was reason to believe that Triplan would be unable to pay the costs if Parkinsons were successful, the Court had no discretion but had to order security. The Court of Appeal rejected the argument and held that s. 447 of the Companies Act was not mandatory but gave the Court a discretion which was to be exercised having regard to all the circumstances of the particular case. Lord Denning MR, and Cairns LJ, gave some circumstances which a Court could take into account whether or not to order security for costs against a company. In the case before them, they included the fact that (a) the application for security was made shortly before the date fixed for the hearing of the arbitration; (b) the probable inability of Triplan to meet an order for costs was likely to be dependent on the failure to recover the sums which were being claimed in that very arbitration; and (c) an order for security might well result in Triplan being unable to proceed at all with its *bona fide* claim.

At the conclusion of the hearing, I did say that *Parkinsons'* case was most relevant to the issues in the present case. So far as the law is concerned, as s. 388(1) of our Companies Act is the same as s. 447 of the United Kingdom Companies Act, our High Court would exercise the same discretion as that obtained in the High Court in England. As for the facts and circumstances, however one looks at them, be it the parties, the claims, the issues and the amounts involved, in the present case, they are more in favour of the respondents than they were for Triplan in *Parkinsons'* case that the arbitration proceedings should proceed without security for costs. There is also the added fact here that there are innocent sub-contractors whose claims are wholly dependent on the arbitration proceedings.

Having regard to the foregoing, I dismissed the application with costs as I was of the view that an order for security for costs would be oppressive to the respondents.

Also found at [1988] 2 CLJ 364